IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978
No. 78-448

SANDRA LYNN WRIGHT, et al.,

Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Claude L. Callegary
413 St. Paul Place
Baltimore, Md. 21202
Phone: 301-727-1365
Attorney for
Petitioners

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sandra Lynn Wright, Plaintiff and Appellant below, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above captioned case on June 20, 1978.

OPINIONS BELOW

The per curiam opinion of the Court of Court of Appeals for the Fourth Circuit is unreported and reproduced in Appendix A, infra, pp. 13-15. The opinion of the trial court, the District Court for the District of Maryland (Alexander Harvey, II, Judge), is also unreported and reproduced in Appendix B, infra, pp. 16-33.

The opinion of the trial court was rendered on August 15, 1975 and the memorandum and Order was entered on June 6, 1977.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, pp.13-15) was entered on June 20, 1978. The jurisdiction of this Court is predicated on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Did the Court of Appeals improperly apply the standards of Rule 56, F.R.Civ.P., in affirming the decision of the District Court in the face of admitted facts from which reasonable men could draw differing inferences?

Did the Court of Appeals deprive the Petitioner of her right to appellate review by ruling on only one of three independent allegations of negligence, any one of which having been a sufficient basis for liability?

STATUTES AND RULES INVOLVED

This case involves Rule 56 (c), F.R.Civ.P., governing summary judgments which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

and Rule 56 (e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise

> provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respons, summary judgment, if appropriate, shall be entered against him.

This case also involves 28 U.S.C. § 1291, the statute conferring jurisdiction upon the Courts of Appeal to hear appeals from decisions of the district courts:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

STATEMENT OF THE CASE

Sandra Lynn Wright and her husband, Robert C. Wright, individually and as next friend of their minor children, brought suit under the Federal Tort Claims Act, 28 U.S.C., § 2671, et seq.

Petitioner's amended complaint alleged that the defendant was negligent in accepting Jonathan Francis Pollard, hereafter referred to as Pollard, into the United States Marine Corps. Petitioner alleged that Pollard had dangerous propensities which were discoverable by a psychological examination, discussed infra. Pollard was trained by the government as a "fighting man" and received special training as a small arms repairman.

In early 1973, several rapes were reported in and around Aberdeen, Maryland, where Pollard was stationed. It was admitted that on August 28, 1973, Pollard raped Sandra Lynn Wright in her home, in the presence of her children, while using a weapon to intimidate her. He was convicted of the offense.

Petitioner testified in her deposition that on August 28, between 10:00 and 11:00 in the morning,

she was washing dishes when a black man entered the back door of her home and pulled out a gun described by her as shaped like an automatic with a dark barrel 8 to 10 inches in length. She immediately screamed and was told to shut up. The weapon was shoved in her stomach and she was pushed into the bedroom where she was raped. Pollard "just kept pointing the gun at me and if I did something he didn't like or said anything he didn't like he kept thrusting it towards me."

Pollard's version as given in his deposition differed as to material facts only in his claim that the weapon used was a knife rather than a gun.

Shortly before his seventeenth birthday, Pollard had contacted the Marine Corps recruiters in Philadelphia. A medical examination was performed by Dr. George Isajiw, whose affidavit submitted by the government fails to reveal how much time was devoted to the examination. Dr. Isajiw appears to have relied on Pollard's own statements that he had never attempted suicide, had never been a sleep walker, etc. as the basis for checking the psychiatric status of Pollard as "normal". Additionally, Dr. Isajiw's affidavit seems to rely on the fact that he had received "no information from medics or others" suggesting such problems. It was his practice to ask additional questions when an applicant uniformly answered all pertinent questions on the form. Whether this was actually done in Pollard's situation is not clear, nor does the affidavit (executed more than three years later) show the nature and extent of any psychiatric training by Dr. Isajiw nor whether it was based upon an actual recollection of the facts or based simply on a review of the forms that were used.

Pollard testified there were no psychological tests at the time of enlisting and the government admits that he never had an interview with a psychiatrist or psychologist while he was associated

with the Marine Corps.

When interrogated as to efforts made prior to enlistment to investigate Pollard's reputation with respect to moral character, his prior involvement with the police, his personality, psychological profile, secual orientation and history, the government relies - in addition to the affidavit of Dr. Isajiw - on a request for a "police record check" sent to the Philadelphia police authorities with the form returned checked "No" as to the existence of a "police or juvenile record". Whether this meant there was no record of any conviction as opposed to no record of apprehensions, arrests or investigations is open to differing inferences.

Pollard received recruit training and was assigned to the small arms repair unit at the Aberdeen Proving Grounds, Maryland. On July 15 and July 17, 1978, two rapes occurred in the Aberdeen area, during periods when Pollard had liberty.

On July 15, the Army Criminal Investigation Detachment recorded an alert from the Aberdeen Police Department to be on the lookout for a rape suspect who had been transported to Building 5453 at the Proving Grounds by cab. The suspect was described as a Negro male 70-72 inches tall weighing between 140 and 150 pounds. A complete check of the whole post for anyone matching description of suspect met with negative results although the description matched Pollard and his description as it appeared in the defendant's records.

On July 17, a similar description was furnished to the defendant in connection with a second rape. On August 28, the defendant was notified of the Petitioner's rape and, noting the times and descriptions in each case, began to suspect a night student at the Proving Grounds. The same day, at a formation of the night class of Marines, Pollard was separately identified by two of the rape

victims, including the Petitioner. Pollard admitted to raping the Petitioner at knifepoint and confessed having sexual problems before entering the service.

Procedures for checking weapons out for use in class and for their return were set out in defendant's answers to interrogatories. Pollard maintained there was a physical search of students at the end of each class (App.103) but defendant's answers to supplemental interrogatories make no mention of any such alleged practice.

Pollard's deposition indicated that on August 28 he left the post without having to show any identification. The defendant indicates that Pollard, and presumably all others, was required to show a valid military identification card to the military policeman at the gate when leaving or entering. This discrepancy gives rise to at least two differing inferences: (1) Pollard evaded the requirement or (2) the government does not follow or enforce its prescribed procedures. A similar discrepancy exists with respect to security for classes attended by Pollard. Exhibits covering security at the Proving Grounds required two men to remain in classrooms to safeguard weapons during breaks. The defendant's answers to supplemental interrogatories showed that only one guard was actually used. Likewise, exhibits called for a daily inventory by count of all weapons and a monthly inventory by serial number of sensitive items and a monthly unscheduled inspection of the arms room. Supplemental interrogatory 32 called for a full description of all security measured actually in force at the Proving Grounds for the two months prior to August 28, 1973. An extensive answer revealed no mention of any inventory except an inventory of records if the weapons custodian had to leave his post.

Following his conviction Pollard was examined by the State authorities at the Patuxent

Institution at Jessup, Maryland. That examination revealed: (1) Pollard had been stealing since age 14, although "never caught" by the police; (2) he began drinking at age 14 and became "very dependent" on marijuana; (3) he is, on psychological examination, impulse dominated with few inner controls; (4) he tends "to act out in a hostile manner; (5) he is a "disturbed individual"; and (6) acts out in a "rather aggressive dangerous manner".

The District Court granted defendant's Motion for Summary Judgment on the basis that Petitioner had failed to demonstrate that a material issue of fact existed, Appendix B, infra, pp. 16-33.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARDS TO BE USED BY THE LOWER COURTS IN APPLYING RULE 56.

Few rules are more settled than that summary judgment is rarely appropriate in an action for alleged negligence. The reasons for this rule include the fact that negligence issues concerning the exercise of reasonable care under the same or like circumstances, whether a given defendant measured up to that standard, foreseeability of risk, causation, whether there was more than one proximate cause, whether causes were concurrent, intervening or superseding, contributory negligence of a plaintiff are generally considered "jury questions" in which setting the credibility of party-witnesses and "independent" witnesses can be assessed by the trier of facts from demeanor, response to cross-examination and the like as opposed to consideration of affidavits, which must be carefully prepared. In the typical negligence case many of these issues are intertwined. And where, as in the instant case, causation, the standard of care, foreseeability and the likelihood of a greatly increased risk to one in

the position of the Petitioner are closely related, these issues require and deserve the determination of a fact-finder in order to make a fully considered evaluation of the facts and, of equal importance, the inferences that may properly be drawn after a careful consideration of all relevent facts.

The law applicable to the granting of a motion for summary judgment has been stated by this Court in Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245, 249 (4th Cir. 1967) as follows:

> "It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions ... Burden is upon party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him ..."

> "As we stated in American Fid. & Cas. Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965):

> > 'Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the' "

> > " 'inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.' "

To state the matter somewhat differently, facts may be undisputed yet still be controverted. The root problem with the instant case is not the lack of specific facts recited by the Petitioner to show negligence on the part of the defendant but the kind of evidence necessary to demonstrate such facts.

Clearly, the defendant, as movant, has the burden of establishing that no genuine issue of fact is involved, and all evidence must be viewed in a light most favorable to the Petitioner. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). Petitioner contends that the evidence thus far adduced, when viewed in that light, gives rise to an inference that the defendant was negligent.

The difficulty in determining whether such an inference has arisen is complicated by the fact that the Petitioner is alleging negligent omissions, such as failure to conduct an adequate mental examination of Pollard, rather than specific commissions, such as running a red light or driving while intoxicated.

The Petitioner contends that the District Court, and the Court of Appeals through its affirmation of the District Court's decision, misapplied Rule 56 (e) by failing to give proper weight to the evidence put forth by Petitioner. Although the Petitioner introduced no evidence of a negligent commission by the defendant, the evidence gave rise to an inference that the defendant:

(1) could have discovered Pollard's mental state by probing during his pre-induction examination, as the police did on August 28.

(2) could have identified Pollard as the rapist, prior to August 28 on the basis of the information given concerning the two earlier rapes.

(3) could have followed the weapons control procedures already established.

Evidence was introduced that gave rise to an inference that not all possible, or even routine examinations were performed on Pollard. A reasonable man could also have concluded from the testimony that the defendant could have identified Pollard as the rapist prior to August 28 on the basis of the descriptions, the time and weapon used. Finally, answers to supplemental interrogatories show a discrepancy between regulations and actual performance in the control of weapons, a fact giving rise to an inference of negligence.

The Petitioner contends that the courts below gave too stringent an interpretation to Rule 56 and required the Petitioners to show specific commissions of negligence and failed to consider the evidence giving rise to an inference of negligent omissions on the part of the defendant. The instant case is in conflict with Tyndall v. United States, 295 F.Supp. 448 (E.D.N.C. 1969), in which a summary judgment motion was denied, holding that further evidence was necessary to determine whether or not the United States was negligent in failing to adequately control the taking of vehicles off a military base.

II.

THE COURT OF APPEALS FAILED TO GIVE PETITIONER HER RIGHT TO APPEAL BY FAILING TO RULE ON TWO ISSUES.

In its per curiam opinion, the Court of Appeals identified three independent allegations of negligent conduct on the part of the defendant. Appendix A, infra, pp. 13-15. These were failing to give Pollard an adequate examination, failing to

identify Pollard as the rapist, and failing to adequately control weapons on the base. These were the allegations made by Petitioner in her brief before the Court of Appeals. Any one of these three allegations, if proven to the satisfaction of the trier of fact, would be sufficient to support a verdict in Petitioner's favor. And, any one of these three allegations, if it presents a genuine issue as to a material fact, should be sufficient to successfully oppose a motion for summary judgment.

However, the Court of Appeals only discussed and ruled on one of these allegations of negligence, that of failing to identify Pollard prior to August 28. No mention is made in the judgment of June 20, 1978 as to a decision on the other two allegations.

The statute that confers appellate jurisdiction on the Courts of Appeals to review the decisions of the district courts, 28 U.S.C. § 1291, creates a concomitant right in the parties before the district courts to have their cases reviewed by the Courts of Appeals. Even if jurisdiction could be declined by the Courts of Appeals, it is clear in the instant case that no such rejection of jurisdiction was attempted. In fact, the Court of Appeals ruled on one issue and obviously believed that it possessed and exercised jurisdiction in the instant case.

The Petitioner contends that 28 U.S.C. § 1291 creates a right and a reasonable expectation that her cause be fully heard and decided by the Court of Appeals. To do less is to make that statute meaningless and to effectively frustrate any appeal.

In effect, the Petitioner has been permitted to brief and argue her case but not have any decision beyond a rubber-stamp affirmation of the decision of the district court. As the record stands,

she has no indication the Court of Appeals even considered the bulk of her appeal arguments. The Petitioner would request this Court, at a minimum, to remand this case for a full consideration of the issues.

CONCLUSION

For the above reasons, the Petitioner requests that the Supreme Court of the United States issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

Claude L. Callegary
413 St. Paul Place
Baltimore, Md. 21202
Phone: 301-727-1365
Attorney for
Petitioner

APPENDIX A
United States Court of Appeals
For the Fourth Circuit
(UNPUBLISHED)

No. 77-2241

Sandra Lynn Wright and Robert C. Wright, individually and as father and next friend of Robert C. Wright, Jr. and Kathy Lynn Wright, minors,

Appellants,

versus

The United States of America,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Submitted June 2, 1978 Decided June 20, 1978

Before HAYNSWORTH, Chief Judge, RUSSELL, Circuit Judge and THOMSEN*, Senior District Judge.

(Claude L. Callegary on brief) for Appellants; (Jervis S. Finney, United States Attorney and John W. Sheldon, Assistant United States Attorney on brief) for Appellee.

*Honorable Roszel C. Thomsen, Senior District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

The plaintiff was the victim of a rape committed by a member of the United States Marine Corps. She sued the United States under the Tort Claims Act, charging negligence (1) in failing to have given the rapist a pre-enlistment mental examination sufficient to determine whether or not he was then a sociopath, (2) in failing to have identified and apprehended him as the person who had committed two previous rapes under similar circumstances, and (3) in not taking measures to insure that each marine leaving the base was unarmed with a pistol or a knife.

It is clear that the Marine officials were cooperating with the police when informed that the person who committed the first two rapes was in clothing resembling a Marine fatigue uniform. It was not until after the rape of the plaintiff, however, that the Marine officials were enabled to identify a reasonably small group of which the rapist must have been a member, if, indeed, he was a member of the corps stationed at that base. That group was then assembled as a lineup to be viewed by the victim of the second and third rapes, and both women identified the same man as the rapist.

The duty of care owed by the Marine Corps officials to the plaintiff emcompassed no more than was done. We perceive no issue of material fact and think that the district court properly granted summary judgment for the United States.

AFFIRMED.

Baltimore, Maryland

August 15, 1975

Before the HONORABLE ALEXANDER HARVEY, II,

U. S. District Judge, at 2:00 p.m.

ORAL OPINION

THE COURT: This tort claim action presents questions similar to some of those which this Court had before it in the very recent case of Ballew v. United States, 389 F. supp. 47, a decision of mine February 7, 1975. In particular, the assault exception to a tort claim suit under 28 U.S.C. § 2680 (h) which is at issue here was carefully considered by me in a memorandum and Order in the Ballew case which is unreported but was filed on April 24, 1974.

Here, Sandra Lynn Wright and Robert C. Wright, individually and as father and next friend of Robert C. Wright, Jr., and Kathy Lynn Wright, minors, bring this action against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680. Plaintiffs seek damages in this case for personal injuries allegedly caused by the negligence of government agents or agents of the government.

The incident prompting this suit occurred on August 28, 1973, at the home of Sandra Lynn and Robert C. Wright in Aberdeen, Maryland. On that day, one, Jonathan Francis Pollard, an enlisted man in the United States Marine Corps, stationed at the Aberdeen Proving Grounds, allegedly entered the Wrights' home and assaulted, raped and robbed Mrs. Wright in the presence of her two minor children.

In support of their claim that agents of the government were negligent, the plaintiffs allege that "the defendant, acting through its agents, was ... negligent and careless in the selection, care, custody and treatment of Pollard," because, through its agents the United States "knew or should have known of Pollard's vicious, criminal, assaultive and dangerous propensities and ... prior criminal acts ...," that prior to the attack upon Mrs. Wright,

Pollard had been involved in a series of crimes relating to rape and assault, specifically, in two rapes occurring in the Aberdeen, Maryland area on July 15, 1973 and on July 27, 1973; and that the United States negligently permitted Pollard to have unrestricted liberty and access to military weapons.

Plaintiffs further allege that, as a direct and proximate result of this negligence, Mrs. Wright was, at gun point, assaulted, raped and robbed by Pollard in the presence of her two minor children. The weapon employed by Pollard is alleged to have been one issued by the military.

Presently before the Court is the government's motion to dismiss, based essentially on § 2680 (h) the so-called assault exception.

Of course in a motion such as this, the facts, as alleged in the complaint are to be regarded by the Court "in the light most favorable to the plaintiffs." Applicable cases which have applied the assault exception to bar a suit such as this one are cited in my opinion in the Ballew case at page 49 and have been cited in the briefs here. At that same page, page 49, this Court noted those cases in which the assault exception had been held not to be a bar to an action such as this one. Those were cases which held that the assault exception to the Federal Tort Claims Act applies only to assault by agents of the Federal Government and not to assault by third parties which the government fails to prevent, and those cases, as I indicated, are found at page 49 of the Ballew opinion.

This case does not involve a third party assault but rather one committed by a member of the Armed Services. The closest cases, as far as the facts are concerned, to what we have here, that have been cited are the two 5th Circuit cases.

United States v. Shively, 345 F.2d 294 (5th Cir.) cert. denied, 382 U.S. 883 (1965) and Underwood v. United States, 356 F.2d, 92 (5th Cir. 1966).

In Underwood, the 5th Circuit decided that the language of § 2680 (h) did not necessarily require that every intervening assault by a federal employee precludes relief against the United States in a Tort Claims Action based on negligence. In that case, after a United States Airman shot and killed his wife, the deceased's father brought suit against the United States under the Federal Tort Claims Act for negligently allowing the Airman, who was known to the Air Force doctors to be mentally and emotionally unstable, to return to duty and to obtain the pistol used in the killing.

The Fifth Circuit found, in Underwood that based upon the airman's prior mental illness, the government could reasonably have anticipated the intervening assault by him. The Court then found that, under Alabama law, which was to be applied in that case, the negligence of the United States and its agents was the proximate cause of the plaintiff's injury. Thus, it was found that the claim of negligence asserted by the plaintiff was independently actionable and not simply a claim arising out of the airman's assault and battery. In that case the United States had not specifically claimed the protection of § 2680 (h) but the Court discussed the exception in some detail in any event and presumably the decision would be followed in the Fifth Circuit.

The case is significant because, in an earlier case, a year or so before, the Shively case, a different result had been reached and the exception had been held to apply. The main distinction was that in Shively, the Court applied Georgia law while in the Underwood case, the Court, the same Court, applied Alabama law. But Shively and Underwood together demonstrate

that § 2680 (h) should not be interpreted as an automatic, perfunctory bar to all negligence suits against the United States where an assault and battery by a military employee intervenes between the alleged negligence and the injury.

In my opinion, the Fourth Circuit would follow the Underwood case. I reach this conclusion on the basis of Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968) where, at page 15, the Court said this:

> "We have carefully considered the government's contention that this case is within one of the exceptions to governmental liability found in the statute. We think 28 U.S.C., § 2680 (h) is inapplicable. If this is a valid claim here, it is founded on negligence even though assault or false imprisonment may be collaterally involved."

The later Third Circuit case of Gibson v. United States, 457 F.2d 1391 (3rd. Cir. 1972) interpretated Rogers as pointing out that this need not be a third-party actor situation for the assault exception to be inapplicable. In the Gibson case, the Third Circuit said this:

> "In one case, however, the 4th Circuit did not rely on the third-party situation but held the assault exception did not apply since the claim was founded on negligence even though assault or false imprisonment may be collaterally involved" citing Rogers.

In the present case, plaintiffs have alleged that Pollard had been involved in rapes on two previous recent occasions, both within two months of the attack upon Mrs. Wright and that the United States, through its agents, had

knowledge of these events. Possessing much knowledge, the government could reasonably have anticipated that unless properly controlled or confined, Pollard would become involved in another rape. Therefore, the allegation that the government failed to control Pollard and restrict his access to military weapons is sufficient, in my opinion, to establish a cause of action for negligence.

Furthermore, from a review of the Maryland cases, I have concluded that in Maryland these facts would be sufficient to prove proximate causation.

In State ex rel Schiller v. Hect Co., 165 Md. 415, 421, 169 A. 311, 314 (1933), the Maryland Court of Appeals, adopting and quoting Section 324 of the Restatement of Torts said this:

> "If the realizable likelihood that a person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for an injury caused thereby ..."

See also Kaplan v. Stein, 198 Md. 414, 84 A. 2d 81 (1951); Holler v. Lowrey, 175 Md. 149, 200 A. 353 (1938).

However, as this Court observed the Ballew case, in the ruling on the pretrial motion, the question of proximate causation is one for the trier of the fact. But I am satisfied that the facts as alleged here, when looked at in a light favorable to the plaintiffs, are sufficient, under Maryland law, to permit this question of proximate causation to be presented to the trier of fact. Certainly the question is a close one but at least

the Court would have to have the facts developed before there could be a definitive ruling on the question of proximate causation.

So for all those reasons, the points made by the government based on the assault exception would be overruled.

Now, there is another point that is raised here, and that has to do with the requirement under the Federal Tort Claims Act that the claim is to be presented to the appropriate federal agency. The briefs indicate that, as to some of the claims, all but one of the claims, this has been done. But that has not been alleged in the complaint so I think we should have an amended complaint, and I think there should be proper allegations as to all the counts, including the count for consortium, which would have to be a fifth count. There have only been four so far.

So that I'm going to do is grant the motion to dismiss, with leave to the plaintiffs to file a second amended complaint within 20 days and if you will file your administrative proceedings, if you want to press the consortium, then you can include that as another count. Otherwise you should make the proper allegations in the earlier count. But as far as the other point is concerned, I am satisfied that that would not support a motion to dismiss.

So, when the amended complaint comes in, if the government will then file an answer we can proceed with discovery and other proceedings in the case.

All right gentlemen, thank you very much. We will stand in recess until 3:30.

(Thereupon, at 3:10 p.m., the aforecaptioned proceedings were concluded.)

MEMORANDUM AND ORDER

Plaintiffs, Sandra Lynn Wright and her husband, Robert C. Wright, have brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq.[1] In their amended complaint, plaintiffs allege that the negligence of employees of the United States proximately caused them injury and damage when a United States Marine stationed at Aberdeen, Maryland entered the Wrights' home on August 28, 1973 and raped Mrs. Wright in the presence of her children.

The Marine who committed the offense, one Jonathan Francis Pollard, was convicted of rape following his plea of guilty in the Circuit Court for Harford County, Maryland, on May 28, 1974. In their amended complaint, plaintiffs allege that employees of the defendant were negligent in accepting Pollard into the Marine Corps, in allowing him access to a military handgun, and in allowing him unrestricted liberty when they knew or should have known that he was a person with criminally assaultive propensities and had been involved in a series of previous crimes, including rapes which had occurred on two previous occasions in and around the Aberdeen Proving Grounds in July 1973.

The defendant had originally responded to this action by filing a motion to dismiss the complaint. Following a hearing, this Court granted the motion, with leave to the plaintiffs to file an amended complaint. This Court rejected the government's contention that plaintiffs' action was barred by the "assault exception" to the Tort Claims Act contained in 28 U.S.C. s2680 (h).[2]

[1] Suit has been filed by the plaintiffs individually and as next friend of their two minor children.

[2] 2680(h) provides that the provisionf of the Torts Claims Act "shall not apply to--(h)Any claim arising out of assault, battery ..." On March 16, 1974, that section was amended to permit suit after that date against the United States for assaults, batteries and other torts, where such torts are committed by investigative or law enforcement officers of the United States. As the assault here occurred on August 28, 1973, that amendment is not applicable here.

[3] An amended complaint was required because plaintiffs had not alleged compliance with 28 U.S.C. §2675(a).

In view of the allegation in the complaint that Pollard had been involved in rapes on two recent occasions previous to his attack on Mrs. Wright and thus defendant could reasonably have anticipated that he might become involved in another rape, this Court concluded that an amended complaint containing such allegations would state sufficient facts to raise the issue whether plaintiffs' injuries were proximately caused by the negligence of government employees.[3] See Underwood v. United States, 356 F.2d 92 (5th Cir. 1966). It has been held that even though an assault may be collaterally involved, the claim of a plaintiff may not "arise out of" the assault but may under certain circumstances constitute a separate and independent claim of negligence against the United States. Cf. Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968); Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972).

An amended complaint was duly filed, and defendant filed an answer denying negligence on its part. Following extensive discovery, defendant filed a motion for summary judgment. Plaintiffs opposed the motion, and a hearing was held in open court. At the hearing, the Court directed the parties to submit further memoranda specific-

ally addressing, inter alia, plaintiffs' claims concerning Pollard's involvement in the two prior rape incidents. Such memoranda have now been filed. After consideration of the entire file in this case, this Court concludes that there is no dispute as to any material fact and that defendant's motion for summary judgment should be granted pursuant to Rule 56, F.R.Civ.P.

In support of its motion for summary judgment, defendant relies on the extensive materials produced by way of discovery in this case, including the following: (1) defendant's answer to Interrogatories; (2) plaintiffs' answers to Interrogatories; (3) depositions of plaintiff Sandra Lynn Wright and of Jonathan Francis Pollard; and (4) affidavits, investigative reports and other documents which form a part of the record in this case. Of particular significance is defendant's Interrogatory No. 47, which asked plaintiffs to describe in detail every act or omission of defendant's employees which constituted negligence or carelessness as alleged in the amended complaint. In answering that Interrogatory, plaintiffs stated that defendant's employees were negligent (1) in not properly investigating the background of Pollard; (2) in negligently failing to safeguard a handgun, permitting Pollard to remove such weapon and use it in the rape; and (3) in failing to examine Pollard adequately to determine his mental state and propensity to commit crimes or other vicious acts. This Court would note that plaintiffs have also alleged that employees of the defendant knew or should have known that Pollard had been involved in two rape incidents shortly before August 28, 1973. Each of these allegations of negligence will be examined separately.

Plaintiffs' allegation that the United States Marine Corps Recruiting Service was negligent in not properly investigating the background of Pollard

The record here discloses that prior to Pollard's enlistment in 1972, Marine Corps recruiters checked with police officials in Pennsylvania, where Pollard had lived since the age of one, with respect to any previous involvement on his part with the law. Reports of the Philadelphia Police Department and a presentence report indicate that as of November 1972, Pollard had no police or juvenile record of arrests or convictions. The presentence report was prepared by State Probation Officer Louis Sostrin after Pollard's conviction in the Circuit Court for Harford County of the rape of Mrs. Wright. The report states that inquiry with the Federal Bureau of Investigation and with state and local police officials in Pennsylvania and Maryland revealed no prior arrest record for Pollard.

In their answer to Interrogatory No. 47(f), plaintiffs state that "a proper character background check would have produced information by which the United States Marine Corps Recruiting Service could have known or should have known that the recruit Pollard had displayed in the past, criminal tendencies." Asked in defendant's Interrogatory No. 58 to state the specific information that a more extensive background check would have produced and to state the names of witnesses and documents or other tangible evidence which would support plaintiffs' response, plaintiffs did no more than state that "a character background check would have given a more detailed picture of Pollard's personality and would have revealed more information as to his social behavior." No witnesses, documents or other evidence has been cited by plaintiffs in support of this conclusory statement.

II

Plaintiffs' allegation that the United States Army and the United States Marine Corps negligently failed to safeguard a dangerous weapon,

namely a gun, and that such failure permitted Pollard to remove the gun from Aberdeen Proving Grounds and use it in the rape of the plaintiff

On the record here, a question of fact exists as to whether Pollard was armed with a handgun at the time of the rape. From the time of his arrest, Pollard has maintained that he did not have a gun during the commission of the crime, but that he had a pocket knife. However, Mrs. Wright stated in her deposition that Pollard did display a gun, described as being black or charcoal grey, very large, shaped like an automatic, with a barrel of eight to ten inches which had on the end of it what appeared to be a silencer. For the purpose of a ruling on this motion for summary judgment, this Court will assume that Pollard had a handgun when he raped Mrs. Wright.

Defendant's Interrogatory No. 60 requested plaintiffs to give a concise statement of the facts relied upon to show that Pollard removed the gun in question from the Aberdeen Proving Grounds. In response, plaintiffs indicated their reliance on the fact that at the time of the rape, Pollard was being trained as a small arms repairman at the base, and that the description of the gun given by Mrs. Wright fits that of a ".45 caliber automatic pistol military-type weapon." Plaintiffs further stated, "It is reasonable to assume that since Pollard had somewhat free access to military firearms, that the firearm described by Plaintiff was a military firearm, removed from Aberdeen Proving Grounds by and through the negligence of the Defendant and was the property of the Defendant."

In answer to plaintiffs' Interrogatory No. 32, defendant has described in detail the security measures which were utilized to safeguard weapons at the Arsenal Building at the Aberdeen Proving Grounds and the elaborate procedures which were required to be followed in issuing weapons for use in training. In answer to plaintiffs' Interrogatory No. 30, defendant stated that no handguns

were reported stolen or lost at the Aberdeen Proving Grounds between June 1, 1973, a date prior to Pollard's arrival at Aberdeen, and August 28, 1973, the date of the crime.

III

Plaintiffs' allegation that the United States Marine Corps Recruiting Service failed to examine Pollard adequately to determine his mental state and propensity to commit criminal and/or vicious acts

The government acknowledges that at no time before or after his enlistment did Pollard undergo examination by a psychologist or psychiatrist. Prior to acceptance into the Marine Corps, Pollard was given the standard medical examination to determine whether he was medically qualified for enlistment. The affidavit of Dr. George Isajiw, who conducted the physical examination on November 27, 1972, states that from the medical history given by Pollard, from the physician's own observations during the examination, and from the information supplied by military personnel who assisted in the examination, Dr. Isajiw found nothing which suggested past or present emotional, social or psychiatric problems. Accordingly, the physician made a psychiatric evaluation of "normal" in Pollard's medical records. Dr. Isajiw's affidavit states that the examination revealed no indication that Pollard possessed any unusual propensities for violence. The procedures followed by Dr. Isajiw were performed in accordance with Army Regulations AR 601-270 and AR 40-501, governing medical examination of recruits.

Plaintiffs assert in answer to defendant's Interrogatory No. 47(k) that "a thorough psychological examination would have disclosed the vicious and criminal propensities of Pollard." Asked in defendant's Interrogatory No. 59(a) to state the facts on which they rely to support this assertion

and in No. 59(b) to identify any experts plaintiffs answered as follows:

> "(a) It stands to reason that a thorough psychological examination is medically more valuable in evaluating a patient's health than that same patient being asked questions from a 'checklist' regarding any past psychological problems, etc.
>
> "b) None." (Emphasis in original)

However, in answer to Interrogatory No. 47(1), plaintiffs stated that they did not contend that any applicable standard of care of performance was violated in the examination of Pollard.

IV

> Plaintiffs' allegation that employees of the defendant knew or should have known that Pollard had been involved in two recent rape incidents shortly before August 28, 1973

The only possible other basis for any negligence on the part of the defendant besides the three allegedly negligent acts or omissions set forth in plaintiffs' answer to Interrogatory No. 47 in the allegation that Pollard had been involved in two prior rapes of which military personnel had or should have had knowledge. In support of its denial of this allegation, defendant has filed copies of various reports of Army investigators which reflect the course of the investigation of the rape incidents that occurred on July 15, July 27 and August 28, 1973, in and around the Aberdeen Proving Grounds. These reports show that from time to time several Marines beside Pollard had come under suspicion in connection with these crimes. However, no facts were developed connecting Pollard to the July rapes until the day following his assault on Mrs. Wright. At a formation of Marines held

on August 29, 1973, both Mrs. Wright and the victim of the July 27 incident identified Pollard as the assailant. Thus, the record here conclusively shows that military officials did not until after August 28, 1973 receive notice or have cause to suspect that Pollard had been involved in the July incidents or in any other illegal or improper activities.

In response to this Court's specific request that plaintiffs inform the Court whether there was any basis in fact for their allegation that the defendant knew or should have known of Pollard's involvement in the two prior rape incidents, plaintiffs' counsel advised that plaintiffs have no further evidence beyond that which was submitted in opposition to defendant's motion for summary judgment. Indeed, in the brief letter submitted to the Court after the hearing, the plaintiffs did no more than repeat their contention that an inadequate psychiatric evaluation of Pollard had been undertaken before he was accepted by the Marine Corps.

V

Summary Judgment Standards

Because negligence actions involve issues that are generally considered to be jury questions, namely the reasonableness of a defendant's action or inaction, causation, foreseeability of injury and the like, summary judgment is ordinarily not appropriate in such an action. Spaulding v. Ads-Anker Data Systems-Midwest, Inc., 498 F.2d 517 (4th Cir. 1974); Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir.), cert. denied, 342 U.S. 887 (1951). But this is not to say that a plaintiff in a negligence action must have his day in court even though there is nothing to be tried. Bland v. Norfolk and Southern R.R. Co., 406 F.2d 863, 866 (4th Cir. 1969); Richardson v. Kubota, 337 F.2d 842 (4th Cir. 1964). In a case such as this one where

there is no dispute as to the historical facts, the question to be decided is whether a genuine issue exists as to the inferences or conclusions that may properly be drawn from the evidence. Salmon v. Parke, Davis and Co., 520 F.2d 1359, 1362 (4th Cir. 1975); American Fidelity and Casualty Co. v. London and Edinburgh Ins. Co., 354 F.2d 214 (4th Cir. 1965). Inferences from all the facts in the record must be viewed in the light most favorable to the party opposing summary judgment, and a motion for summary judgment must be denied if permissible inferences drawn from the historical facts would present a jury question. However, where the party moving for summary judgment places in the record depositions, affidavits, documents or other materials developed in discovery which controvert facts alleged in the pleadings, Rule 56(e) requires that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added). See Batchelor v. Legg & Co., 52 F.R.D. 553, 560-61 (D.Md. 1971).

On the record here, it is quite clear that if plaintiffs have not actually conceded the non-existence of facts to support three of the four claims of negligence asserted, they have in any event failed to produce any facts whatsoever in support of them, as Rule 56(e) requires under these cricumstances. This Court concludes that there is no dispute of fact on the record here (1) that the Marine Corps recruiters made a reasonable inquiry under all the circumstances concerning Pollard's possible previous involvement with the law, and that further inquiry would have produced no more information than was actually obtained; (2) that Pollard underwent a medical examination prior to enlistment which was reasonable in scope in view of the fact that Pollard exhibited no characteristics

or history to indicate that further psychological or psychiatric evaluation was required; and (3) that the defendant did not know and had no reason to know that Pollard had been involved in the rape incidents of July 15 and July 27, 1973, if in fact he actually was.

This leaves only the contention that defendant was negligent in allowing Pollard to have access to a military weapon. Exhibits filed disclose that procedures followed at Aberdeen Proving Grounds for safeguarding weapons are comprehensive and more than adequate. In the absence of any specific facts produced by plaintiffs to controvert these exhibits, this Court concludes that employees of the defendant were not negligent in safeguarding their weapons.

Moreover, it is undisputed that no weapons were missing from the arsenal at the military base on the day the rape was committed. Assuming then that Pollard wielded a handgun which resembled a .45 military pistol, the facts here establish that the handgun did not come from the Aberdeen Proving Grounds. At the very least, Rule 56(e) under the circumstances of this case requires that plaintiffs produce specific facts to show that Pollard removed the weapon from the arsenal, used it to commit the crime and returned the weapon without its being noticed. There is nothing in the record here to dispute Pollard's deposition testimony that he did not remove a .45 pistol from the Aberdeen arsenal. Mrs. Wright's deposition testimony does no more than dispute his statement that he did not possess a handgun at the time he committed the crime.

Finally, even if it were to be determined that employees of defendant negligently permitted Pollard to secure a handgun, such a fact would hardly be the proximate cuase of the damages sustained by the plaintiffs because of the rape. Whether or not Pollard possessed a weapon stolen from the arsenal is only of marginal relevance here. When Pollard

accosted her, Mrs. Wright was at home, alone except for her minor children. Pollard's testimony indicates that he would have committed the crime whether or not he had a gun. There is no evidence that Pollard had dangerous propensities known to the authorities before this crime was committed, and the presence or absence of a handgun would add little to the essential proof necessary for plaintiffs to prevail. Thus, this Court concludes as a matter of law that plaintiffs did not suffer loss or damage because of the negligence of defendant's employees in allowing Pollard to have access to a military weapon.

For these reasons, this Court concludes that there is no genuine issue in this case as to any material fact and that defendant is entitled to judgment as a matter of law under Rule 56. Accordingly, it is this 6th day of June, 1977, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion of the defendant for summary judgment be and the same is hereby granted; and

2. That judgment is hereby entered in favor of the defendant, with costs.

/s/ Alexander Harvey
United States District Judge

JUDGMENT

In accordance with the Memorandum and Order dated June 6, 1977 and filed in the above entitled case, it is

ORDERED and ADJUDGED: that the Motion of the Defendant for Summary Judgment be and the same is hereby granted; and that Judgment is hereby entered in favor of the Defendant, with costs.

Dated at Baltimore, Maryland this 7th day of June, 1977.

PAUL R. SCHLITZ,
Clerk

By: /s/ Elizabeth A. Michael
Deputy Clerk
Elizabeth A. Michael

No. 78-448

In the Supreme Court of the United States

OCTOBER TERM, 1978

SANDRA LYNN WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-448

SANDRA LYNN WRIGHT, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals improperly upheld a grant of summary judgment for the United States by the district court. She also contends that the court of appeals failed to rule on all of the issues presented.

1. On August 28, 1973, petitioner was assaulted and raped by Jonathan Pollard, a member of the United States Marine Corps (Pet. App. 22). Petitioner filed suit against the United States in the United States District Court for the District of Maryland. She alleged that the government was negligent because: (1) it failed to give Pollard a thorough character background check when it accepted him for enlistment into the Marine Corps; (2) it failed to safeguard weapons at the Aberdeen Proving Grounds, allowing Pollard to remove a pistol and use it

during the rape; and (3) it failed to apprehend Pollard before the rape was committed and prevent him from leaving his base.

The district court granted summary judgment for the United States (Pet. App. 22-23). Viewing the evidence in the light most favorable to petitioner, the court found that no evidence would support the allegations of negligence and that there was, therefore, no disputed issue of material fact. See Fed. R. Civ. P. 56. The court of appeals affirmed (Pet. App. 13-14).

2. Petitioner contends that the district court and the court of appeals overlooked inferences that might tend to show negligent omissions by the government. But Rule 56 does not allow a party opposing summary judgment to speculate about inferences. It requires the party to set forth by affidavit "specific facts" (Rule 56(e)) to establish the existence of a disputed issue. Here the district court discussed the allegations made by petitioner and found that none of them was supported by any specific facts in the record (Pet. App. 24-29). The court of appeals agreed. There is no need for this Court to review that essentially factual conclusion, concurred in by two lower courts. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

Petitioner also maintains that the court of appeals failed to consider her three allegations of negligence, but instead ruled on only one of them. The court of appeals, however, listed each of the three arguments in its opinion (Pet. App. 14). Although it did not discuss each theory seriatim, it found that the government had not violated a duty of care owed to petitioner (*ibid.*). There is no reason to suppose that the court disregarded any of the theories of negligence listed in the opinion in coming to this conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

DOJ-1978-11